

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 70454-G76M BY JACK W. AND)	
EMMA L. SIMONS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. However, in order to ensure the permittee is measuring and recording the flow rate and volume of water diverted, Condition 4 of the Proposal for Decision is modified as follows:

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza Suite 105, P.O Box 5004, Missoula, MT 59806. This condition is being applied to this permit until quantification through permit verification occurs.

The Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 13, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70454-g76M is hereby granted to Jack W. and Emma L.

CASE # 70454

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Simons to appropriate 300 gallons per minute up to 24.60 acre-feet of groundwater per year at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 18 North, Range 28 West, Mineral County. The period of diversion and use shall be from May 1 through September 1, inclusive of each year, for irrigation. The places of use shall be eight acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and two acres located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 24.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights as provided by Montana law.

2. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

3. This Permit is issued in conjunction with Permit No. 60021-g76M. The combined appropriation as granted shall not exceed a total of 300 gallons per minute up to 94.94 acre-feet per annum.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza Suite 105, P.O. Box 5004, Missoula, MT 59806.

This condition is being applied to this permit until quantification through permit verification occurs.

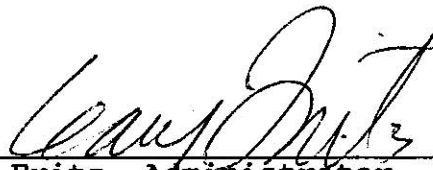
5. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of January, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the
foregoing Final Order was duly served upon all parties of record

at their address or addresses this 21ST day of January, 1992 as follows:

Jack W. Simons
Emma L. Simons
84 Mullan Gulch Road
St. Regis, MT 59866

St. Regis School District
#1 & 6
c/o Edward A. White
Drawer K
St. Regis, MT 59866

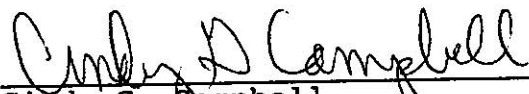
Francis B. Hermes
Box 114
St. Regis, MT 59866

William Uthman, Hydrogeologist
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806

John A. Anderson
Box 52
St. Regis, MT 59866

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 70454-g76M BY JACK W. AND)	
EMMA L. SIMONS)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was convened in the above-entitled matter on September 19, 1991, in Superior, Montana, to determine whether the above Application should be granted to Jack W. and Emma L. Simons under the criteria in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicants Jack W. and Emma L. Simons appeared at the hearing pro se.

Howard Newman, Hydrologist, appeared at the hearing as a witness for the Applicants.

Objector St. Regis School District # 1 and 6 (the School District) appeared at the hearing by and through Superintendent of Schools, Linda Carlsen.

Untimely Objector, John A. Anderson, appeared at the hearing pro se.

Robert C. Managhan appeared as an interested party.

William Uthman, Hydrogeologist with the Department of Natural Resources and Conservation (Department), appeared at the hearing as an expert witness.

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Michael P. McLane, Manager of the Department's Missoula Water Resources Regional Office, appeared at the hearing as an expert witness.

EXHIBITS

Applicants' Exhibit 1 consists of 37 pages and is a draft report dated September 18, 1991, and entitled "Effects of Irrigation Withdrawals by Jensen and Simons on the St. Regis Aquifer, St. Regis, MT" written by Howard Newman, Hydrologist. This exhibit was accepted into the record without objection. This exhibit was superseded by the Final Report dated September 30, 1991, of the "Effects of Irrigation Withdrawals by Jensen and Simons on the St. Regis Aquifer, St. Regis, MT" by Mr. Newman as agreed by all parties at the hearing.

The Department file was made available for review by all parties. There were no objections to any part of the Department file; therefore, it is accepted into the record in its entirety.

PRELIMINARY MATTERS

A request by untimely Objector John A. Anderson was received by the Hearing Examiner on August 26, 1991, (date stamped received by the Department on August 23, 1991) to change the location of the hearing to St. Regis instead of Superior, Montana. See also second paragraph of comments by Objector Anderson dated 28 October 1991, and received by the Hearing Examiner October 29, 1991. The Hearings Unit Legal Secretary attempted to find a suitable place in St. Regis but could find an available room only at the school. Since the School District was

a party in the matter of Application No. 70454-76M by Jack W. and Emma L. Simons and an untimely Objector in the matter of Application No. 70420-76M by Charles H.M. and Mary P. Jensen, it would not have been proper to hold a hearing in its building. Objector Anderson also requested the time of the hearings be changed to an "evening time" so that a "number of vitally interested artesian well owners and taxpayers" could attend. Since the Simons and Jensen wells are located in the same area, the same issues were raised, and the applicants retained the same consultant, it was logical to hold the hearings consecutively in the same location. Although the Simons' Application received only one timely objection and two untimely objections¹, the Jensen Application received 19 objections and one untimely objection. If each of the objectors to the Jensen application were to testify for a period of 30 minutes, the time for the objectors alone would last ten hours which would, with the Applicants' testimony, stretch out to an eleven or twelve hour hearing. Assuming arguendo the Jensen hearing convened at 5:30 p.m. the following day, that hearing would not have been completed until 4:30 or 5:30 a.m. It simply was not feasible to hold the hearing in the evening hours.

¹ARM 36.12.219 provides that the examiner may hear testimony and receive exhibits from an untimely objector at the hearing, or allow an untimely objector to note his appearance, or allow an untimely objector to question witnesses, but no untimely objector shall become, or be deemed to have become, a party by reason of such participation.

It is the Hearing Examiner's belief that Mr. Anderson did not and even now does not realize a contested case hearing held by the Department is conducted as an adversary proceeding where each objector is expected to introduce exhibits, present testimony, call witnesses on his/her behalf, cross-examine the oppositions' witnesses and Department staff witnesses, and make a closing statement. The *number* of objectors attending a hearing is not considered by the Hearing Examiner when making a decision. The Hearing Examiner's decision is based upon the preponderance of evidence presented by the parties. A well prepared party may prevail over twenty poorly prepared parties. Also one *well prepared* lay person who has resided in the area for a long period of time may prevail over expert witnesses. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

The record in this matter was left open until November 15, 1991, for submission of the final version of the hydrogeology report by Howard Newman on September 24, 1991, to be sent to all parties on September 25, 1991. Mr. Newman's final report was received by the Hearing Examiner on or about October 31, 1991. Objectors would be allowed to comment on the final report by October 31, 1991, and Applicants would be allowed to address Objectors comments by November 15, 1991.

The School District's comments written by Linda Carlsen were received by the Hearing Examiner on October 25, 1991. Ms. Carlsen, in her comments, stated that after the St. Regis Board of Trustees reviewed the finalized report, the board found the

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report to have satisfactorily answered all questions and concerns of the School District.

Untimely Objector Anderson's comments were received by the Hearing Examiner on October 29, 1991. In his comments, Objector Anderson suggests a "permanent ban on all further drilling into this fragile Artesian aquifer could be instituted." A contested case hearing is not the proper forum to initiate the designation of a controlled groundwater area. Section 85-2-506, MCA, sets forth the requirements needed for the Board of Natural Resources and Conservation to designate a controlled groundwater area. Mr. Anderson should visit with the personnel at the Missoula Water Resources Regional Office if he wishes more information on controlled groundwater areas. However, Howard Newman's response to Anderson's comments indicate the St. Regis Aquifer is definitely not fragile and that a permanent ban on further drilling is preposterous.

Comments on Howard Newman's final report were submitted to Michael McLane on September 24, 1991, by William Uthman, Hydrogeologist and received by the Hearing Examiner on October 31, 1991. Mr. Uthman testified during the hearing that he agreed with Newman's methods and procedures and that he concurred with Newman's results and interpretations. Uthman, in his written comments, confirmed his testimony.

Applicants' response to the School District's comments was received by the Hearing Examiner on November 14, 1991. Howard

Newman's response to untimely objector Anderson's comments was received by the Hearing Examiner on November 15, 1991.

Applicants and Charles H. M. and Mary P. Jensen have developed irrigation wells in the same vicinity. Applicants and the Jensens retained Howard Newman, Hydrogeologist, to perform an aquifer test and interpret the information gained during the test in report form. Three individual aquifer tests were performed. The results of these tests were addressed in the report which frequently mentions the Jensen well. Although the Jensens are not parties at this hearing, it is necessary to refer to them in this proposal when discussing some of the aquifer tests results.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Jack W. and Emma L. Simons duly filed the above-entitled Application with the Department on April 20, 1989, at 9:17 a.m.

3. Pertinent portions of the Application were published in the Mineral Independent, a newspaper of general circulation in the area of the source, on September 7, 1989. One timely objection was received from the School District. Untimely

objections were received from John A. Anderson and Francis B. Hermes.

4. Applicants seek to appropriate 300 gallons per minute (gpm) up to 24.60 acre-feet of groundwater per year at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 18 North, Range 28 West, Mineral County.¹ The proposed period of diversion and use is from May 1 through September 1, inclusive of each year. The proposed use is irrigation and the proposed places of use are eight acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and two acres located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24. The proposed means of diversion is a well with a 20 horsepower centrifugal pump. The water would be pumped through a buried six-inch delivery line to hand line sprinklers.

The well was completed at a depth of 168 feet on August 6, 1985, by Eugene G. Kane, a licensed well driller with Kane Well Drilling and Pump Service. The well was cased with eight-inch casing down to 160 feet. (Testimony of Jack Simons and Department file.)

5. Applicants own the proposed places of use. (Testimony of Jack Simons.)

6. Applicants presently hold Permit No. 60021-g76M. The instant Application was generated after a complaint was filed by several persons who live in the St. Regis area. The complaint alleged that pumping of the well authorized by this Permit was

¹Unless otherwise specified all land descriptions in this proposal are located in Township 18 North, Range 28 West, in Mineral County.

causing reduced wellhead pressure to several artesian wells in the immediate area. A field investigation was performed by personnel of the Missoula Water Resources Regional Office.

Permit No. 60021-g76M authorizes Applicants to appropriate 300 gallons per minute up to 70.34 acre-feet of groundwater at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24 for irrigation of 28 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 24 and for stock water. The verified irrigated acreage is 38 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 24 which is 10 acres more than authorized by Permit No. 60021-g76M.

(Department file and testimony of Jack Simons and Michael McLane.)

The instant Application is to bring the excess acreage found during the field investigation of Permit No. 60021-g76M into compliance with the Montana Water Use Act. The excess acreage has been irrigated since 1988.

7. St. Regis Public Schools, Mineral County School Districts No. 6 and 1 have filed Statement of Claim No. 76M-W03779 for 25 gallons per minute (gpm) up to 20 acre-feet of groundwater per year by means of a well. The claimed point of diversion and place of use is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24. The claimed period of use is from January 1 through December 31, inclusive of each year. The claimed priority date is 1954.
(Department records.)

8. The School District uses a steam boiler heating system with an automatic water supply safety feature. An electric pump provides water to the various user elements in the District which

includes the High School, the Grade School, a domestic dwelling, and the Senior Citizen Center. If the School District's pump fails, the back up is artesian pressure. Without the artesian pressure, the boiler would be in jeopardy and all the users of the system would be without water. The boiler is operated only during cold weather. (Department file and testimony of Linda Carlsen.)

9. In the absence of long term use records, it is unknown how a severe drought would affect the School District's well if Applicants were pumping from their well. However, if the School District's well experienced no adverse effects in 1973 or 1977, two years of extreme drought, it probably would withstand most other droughts. There is a "built in" safety feature in the case of Applicants' well. Applicants' well is high enough in elevation that it would experience a loss of pressure before any other flowing well in the area. If the pressure should drop two or three pounds at Applicants' well, Applicants would not be able to run their centrifugal pump. This would immediately reduce the burden on the aquifer. (Testimony of Howard Newman.)

10. The St. Regis Aquifer is a leaky or semi-confined aquifer. In a semi-confined aquifer, leakage from the adjacent strata causes the drawdown in a well to stabilize. Stabilization of drawdown could also be caused by the cone of depression intersecting a recharge or source boundary such as a river or fractured bedrock. It is quite possible that recharge to the deep aquifer comes from all three, vertical leakage, lateral

recharge from adjacent bedrock and one or more of the river systems that flow over or adjacent to the St. Regis Aquifer. In any case, there is a constant source of recharge to the confined St. Regis Aquifer that causes drawdown to stabilize after a certain period of time. The end result is that drawdown does not continue to increase as a well is pumped. This hydrologic response lessens the impact of a pumped well on adjacent wells. (Applicants' Exhibit 1 and testimony of Howard Newman.)

11. Pumping of any well in the St. Regis Aquifer will cause an impact on another. The degree of impact is determined by pumping rate and distance. However, even when pumping both the Applicants' and the Jensen wells simultaneously, drawdown stabilizes at the Park well' (the closest monitored well) at 1.4 days. The lower the pumping rate, the less time it will take before drawdown reaches equilibrium.

The aquifer responds rapidly to withdrawals, but after pumping ceases, water levels return to pre-pumped levels. Therefore, long-term pumping of the St. Regis Aquifer will not threaten or diminish future water availability in the system. (Applicants' Exhibit 1 and testimony of Howard Newman.)

12. Howard Newman conducted three aquifer tests. Under the worst case scenario, that is Applicants pumping at 300 gpm and Jensen pumping at 600 gpm for a total pumping rate of 900 gpm,

'Wells monitored during the course during the aquifer test were: Jensen "East", Jensen "West", Jim Jensen, Simons Irrigation, Wood, Mullen Square, Strip Joint, Altman, Managhan, and Wolf.

the Park well which is an average distance of 2030 feet from the Simons and Jensen wells, would experience a drawdown of 2.75 feet or a loss of 1.19 psi. The High School well, an average distance of 2740 feet from the Simons and Jensen wells, would have a drawdown of 2.36 feet or a loss of 1.02 psi. The Altman and Objector Hermes' wells, an average distance of 3058 feet from the Simons and Jensen wells, would have a drawdown of 2.17 feet or a loss of 0.94 psi. Managhan's well, which is an average distance of 3422 feet from the Simons and Jensen wells would experience a drawdown of 2.02 feet or a loss of 0.87 psi. During the summer of 1990, when demands were highest, there was about 18 feet of pressure head in the High School well. There is no evidence a 2.75 foot or 1.19 psi decline at these wells would adversely affect them or any other well in the area. (Applicants' Exhibit 1 and testimony of Howard Newman.)

13. Groundwater levels in the St. Regis Aquifer appear to fluctuate with seasonal stream flow. Groundwater pressures were monitored in two wells during most of the 1990 water year, indicating the groundwater levels fluctuated about 11 feet. Water levels in the St. Regis River from 1959 to 1975, following near normal snowpacks, resulted in seasonal river levels fluctuation at St. Regis of only 2.1 to 4.2 feet between peak flow and low flow elevations. This suggests that recharge to the St. Regis Aquifer is not directly tied to the water levels in the St. Regis River. It is possible that the highest pressures occur during high water periods and the water levels in the aquifer

would correlate with the fluctuations of the Clark Fork River system. However, a better and longer period of record needs to be acquired before the relationship to recharge of the St. Regis Aquifer and stream flow is established. (Testimony of Howard Newman and Applicants' Exhibit 1.)

14. Seasonal snowpack appears to have a direct effect on aquifer recharge. The snowpack in the St. Regis area has steadily declined since 1976 but appears to have bottomed out in 1987, 1988, and 1989. Because western Montana has been experiencing successive years of below normal snowpack, a declining water table is both expected and normal. The trend of declining artesian pressure, as reported by several citizen observers, may be explained by the continual decline in mountain snowpack. (Applicants' Exhibit 1 and testimony of Howard Newman.)

15. There are no planned uses or developments for which a permit has been issued or for which a reservation has been granted. (Department file and records.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, irrigation, is a beneficial use. See § 85-2-102(2)(a), MCA.

5. Applicants have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 5.

6. Applicants have proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed point of diversion in the amount requested and that during the proposed period of diversion the amount requested is reasonably available. See Findings of Fact 10, 11, 12, and 13.

7. Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4 and 6.

Although the irrigation of the excess acreage constitutes appropriation of water without a permit and is a misdemeanor where criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-112 and 46-18-212 (1989). Whether the diversion works were operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town. Applicants have successfully used the diversion works for three years. See Finding of Fact 6.

8. Applicants have provided substantial credible evidence the water rights of prior appropriators will not be adversely affected by the proposed project. See Findings of Fact 9, 10, 11, and 12.

The School District's boiler would not be damaged by the proposed project. Applicants' proposed period of use is from May 1 to September 1, which is the period of time the boiler is generally not in operation. See Finding of Fact 8.

The declining artesian pressure reported by the complainants is more likely to be the result of years of below normal snowpack rather than the pumping of Applicants' well. See Finding of Fact 14.

Upon Applicants' discharge of the burden to produce substantial credible evidence on the issue of the adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce, i.e., Objectors must show they have water rights, describe the operation of their right, state how they anticipate the proposed project will change the conditions of water occurrence or how it will otherwise affect their rights and allege why they will not be able to reasonably exercise their water right under the changed conditions.'

'Although it need not be ruled upon in the instant case, previous rulings by the Department indicate that although a flowing well may be a reasonable diversion, it is not a protectable diversion. Section 85-2-401(1), MCA, clearly states priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of the water table, *artesian pressure*, or water level, if the prior appropriator can *reasonably* exercise his water right under the changed conditions. (Emphasis added.) To hold that an appropriator is entitled to maintain artesian pressure against subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. See In re Application No. 71133-g41B by Hildreth; In re Application No.

It appears the School District has agreed with Mr. Newman that there will be no adverse effect on its prior water rights; however, Ms. Carlsen did not state they had no further objections to the issuance of a permit. At any rate, weighing the Applicants' evidence against the lack of evidence on the part of the Objectors, the preponderance of the evidence in the record is that the water rights of others will not be adversely affected. See Findings of Fact 9, 10, 11, 12, 13, and 14.

Objectors failed to meet their burden of producing evidence that, contrary to Applicants' evidence, the pressure head would be reduced to the point where the Objectors would not be able to exercise their water rights.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 15.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70454-g76M is hereby granted to Jack W. and Emma L. Simons to appropriate 300 gallons per minute up to 24.60 acre-feet of groundwater per year at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of

42666-g41F by MacMillan; In re Application No. 72498-g76L by Cross; In re Application No. 75997-g76L by Carr.

Section 24, Township 18 North, Range 28 West, Mineral County.

The period of diversion and use shall be from May 1 through September 1, inclusive of each year, for irrigation. The places of use shall be eight acres located in the S $\frac{1}{2}$ SW $\frac{1}{2}$ NW $\frac{1}{4}$ and two acres located in the NE $\frac{1}{2}$ SW $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 24.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights as provided by Montana law.

2. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

3. This Permit is issued in conjunction with Permit No. 60021-g76M. The combined appropriation as granted shall not exceed a total of 300 gallons per minute up to 94.94 acre-feet per annum.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this permit until quantification through permit verification occurs.

5. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting

from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

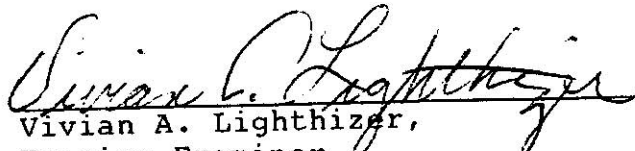
6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of December, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of December, 1991, as follows:

Jack W. Simons
Emma L. Simons
84 Mullan Gulch Road
St. Regis, MT 59866


St. Regis School District
#1 & 6
c/o Edward A. White
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St. Regis, MT 59866

Francis B. Hermes
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William Uthman, Hydrogeologist
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Michael P. McLane, Manager
Missoula Water Resources
Regional Office
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